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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n)	)	
and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of	)	
Mobile Services	)	

COMMENTS OF MOTOROLA INC.

Motorola Inc. ("Motorola") hereby submits these comments in response to the Second Further Notice of Proposed Rule Making adopted by the Commission in the above-captioned docket on July 18, 1994. As a manufacturer of equipment used by mobile radio licensees, Motorola supports the Commission's effort to formulate rules and policies that will maximize the level of competition in the commercial mobile radio service ("CMRS") marketplace. Adoption of the Commission's proposals to impose a cap on the aggregation of CMRS spectrum and to include non-equity arrangements such as management agreements, resale agreements, and joint marketing agreements as attributable interests in the application of spectrum aggregation limits would be contrary to this goal. Motorola thus urges the Commission not to proceed with its proposals in either of these respects.

Respectfully Submitted By:

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I. INTRODUCTION AND SUMMARY

Motorola hereby files these comments in response to the Second Further Notice of Proposed Rule Making recently adopted by the Commission in the above-captioned docket.[1] The *Second Further Notice* represents the latest step in the Commission's ongoing effort to develop rules and policies that will, *inter alia,* maximize the level of competition in the CMRS marketplace. Specifically, in the Second Report and Order adopted earlier in this docket, the Commission attempted to formulate definitions for the statutory elements of "commercial mobile" and "private mobile" radio services that will ensure that competitors providing identical or similar services participate in the marketplace under similar rules and regulations.[2]

Subsequently, in its recently-adopted Further Notice of Proposed Rule Making in this docket,[3] the Commission identified various technical, operational, and licensing rules that must be amended in order to eliminate inconsistencies in the regulatory treatment of substantially similar CMRS operators. The *Further Notice* also asked commenters to discuss whether the level of competition in the CMRS marketplace would be increased by the imposition of a general cap on the amount of CMRS spectrum individual licensees are allowed to aggregate. In the *Second Further Notice,* the Commission now solicits commenters' views as to whether competition would be

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[1] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services,* FCC 94-191 (released July 20, 1994) [hereinafter *Second Further Notice*].

[2] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services,* 9 FCC Rcd 1411, 1420 (1994) (Second Report and Order).

[3] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services,* FCC 94-100 (May 20, 1994) [hereinafter *Further Notice*].

furthered by treating certain non-equity arrangements -- such as management agreements, resale agreements, and joint marketing agreements -- as attributable interests for purposes of applying the 40 MHz limit on the accumulation of PCS spectrum, the PCS-cellular cross-ownership rules, or any more general CMRS spectrum aggregation limit the Commission may adopt.[4]

Motorola strongly supports regulatory action that will foster competition in the CMRS marketplace. In its comments and replies filed in response to the Commission's *Further Notice* in this docket Motorola opposed the adoption of the Commission's proposal to place a general cap on the aggregation of CMRS spectrum as unnecessary and antithetical to this goal. If the Commission nevertheless proceeds with this proposal, Motorola recommends that, in imposing the CMRS spectrum aggregation limit, the PCS spectrum aggregation limit, and the PCS-cellular cross-ownership rules, the Commission should refrain from further expanding its definition of attributable interests to include non-equity arrangements. Contrary to the Commission's aim, the treatment of non-equity interests at attributable would be likely to decrease the level of competition in the CMRS marketplace.

Fundamentally, management agreements, resale agreements, and joint marketing agreements executed in accordance with the Commission's rules and policies do not permit any party other than the licensee to exercise control over the licensed facilities. As such, the spectrum is always controlled by the licensee, and there is no basis for

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[4] *Second Further Notice* ¶ 5.

attributing the licensed spectrum to any other party. In the event that these types of agreements create a situation where an entity other than the licensee exercises *de facto* control, an unauthorized transfer of control will have occurred, for which the Commission has substantial powers under the Communications Act and its regulations to intercede.

In addition, the potentially anticompetitive conduct highlighted as a concern in the *Second Further Notice* is more adequately addressed through the enforcement of antitrust laws and regulations governing fiduciary responsibilities rather than through the use of spectrum aggregation limits and restrictive attribution rules. Finally, because management agreements, resale agreements, and joint marketing agreements promote competition and diversity among service providers, attribution of these types of interests would be contrary to the public interest and the very objectives that prompted the initiation of this docket. For these reasons, Motorola urges the Commission not to treat management agreements, resale agreements, or joint marketing agreements as attributable interests for the purpose of applying spectrum aggregation limits in any context.

II. THE COMMISSION SHOULD NOT ADOPT AN OVERALL CMRS SPECTRUM AGGREGATION CAP

In its comments and replies filed in response to the Commission's *Further Notice* in this docket, Motorola set forth in detail the basis for its opposition to the Commission's proposal to impose a general cap on the amount of CMRS spectrum that

individual licensees may aggregate.[5] Significantly, the vast majority of the commenting parties share Motorola's view that the adoption of a general CMRS spectrum aggregation limit is unnecessary and unwarranted, and would be contrary to the public interest.[6] In view of the overwhelming opposition in the record, Motorola urges the Commission to forego its proposal to adopt an overall CMRS spectrum aggregation limit.

III. NON-EQUITY ARRANGEMENTS SHOULD NOT BE TREATED AS ATTRIBUTABLE INTERESTS FOR PURPOSES OF IMPOSING ANY SPECTRUM AGGREGATION LIMITS

A. Management Agreements

In the *Second Further Notice,* the Commission suggests that the use of management agreements could permit a manager who is also a competitor to have access to market sensitive information (such as the licensee's business plans, customer lists, product and service development plans, or marketing strategies), which could in turn affect the incentive or ability of CMRS licensees to compete, the number of effective competing providers, or the independence of pricing decisions.[7] To foreclose this possibility, the Commission proposes to treat management agreements as attributable interests in the application of the 40 MHz PCS spectrum aggregation limit,

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[5] *See Further Notice* ¶¶ 89-93. *See also* Comments of Motorola Inc., GN Docket No. 93-252 (filed June 20, 1994); Reply Comments of Motorola Inc., GN Docket No. 93-252 (filed July 11, 1994) [hereinafter *Motorola Reply Comments*].

[6] *See Motorola Reply Comments* at 18.

[7] *Second Further Notice* ¶ 6.

the PCS-cellular cross-ownership rules, and the general CMRS spectrum aggregation limit, if it is adopted.[8] The Commission seeks commenters' views with respect to the appropriateness and necessity of treating management agreements as attributable in the context of each type of spectrum cap specifically identified.[9] In addition, commenters are asked to discuss whether management agreements can be structured so that the manager's access to market-sensitive information will not have any adverse effect on competition, and to address how the specific components of management agreements serve to protect against such anti-competitive opportunities.[10]

Motorola believes that it is neither necessary nor appropriate to treat management agreements as attributable interests for the purpose of imposing any spectrum aggregation cap. Significantly, the proposal in the *Second Further Notice* fails to take into account several fundamental considerations that dictate against treating management agreements as attributable interests. First, by definition, a manager cannot exercise control over the licensee's facilities -- the Commission's rules and policies require that a licensee must, at all times, remain in control of and responsible for its operations. Accordingly, in the context of a permissible management agreement that does not involve a transfer of control, there is no reason for suspecting that the manager will be in a position to impede the licensee's competitive potential -- the

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[8] *Id.* ¶ 9.

[9] *Id.*

[10] *Id.* ¶ 8.

central operational, policy, and employment decisions remain exclusively the province of the licensee.

Second, sufficient legal mechanisms exist to address any anticompetitive conduct that may be perpetrated by a manager who abuses access to sensitive business information. For example, the conduct of such entities is fully actionable under antitrust laws and regulations governing fiduciary duties and responsibilities. The use of unduly restrictive spectrum caps and attribution rules is not necessary or appropriate as a mechanism for policing anticompetitive behavior resulting from the violation of antitrust laws or the breach of fiduciary duties.

Third, because management agreements are the product of individual negotiations, they come in a variety of permutations, each with a separate delineation of powers and responsibilities. Any blanket rule that the Commission adopts attributing managed spectrum to a manager will be overbroad, and will encompass arrangements that in no way implicate the concerns expressed in the *Second Further Notice*. The use of unnecessarily overbroad regulatory measures is clearly contrary to the public interest and should be avoided.

Fourth, in Motorola's experience, management agreements have served to increase competition and diversity in the mobile services marketplace by providing a source of consultation, advice, and expertise to inexperienced licensees. The role of management agreements in the development of the 800 MHz and 900 MHz Specialized Mobile Radio Service ("SMRS") provides an illustrative example of the usefulness of

these arrangements. Historically, the dispatch nature of traditional SMR communications made the SMRS attractive to small businesses and individually-owned enterprises. As a result, the SMR industry consists of a large number and variety of licensees. Because the SMRS also has stringent and tightly enforced construction and loading requirements, however, licensees that are unfamiliar with the regulatory structure or with limited practical experience are at a substantial risk of losing their license.[11] Consequently, many SMR licensees relied upon managers to supplement and expand their knowledge of the Commission's rules, as well as to assist them in implementing and successfully operating their systems.

Similarly, management agreements may be used today to assist operations owned by small businesses and individuals who seek expert advice with regard to the operation of their systems. Notably, these are precisely the types of licensees whose participation in spectrum-based services Congress and the Commission have sought to encourage by establishing bidding credits and other special procedures for use by these so-called "designated entities."[12] The benefits derived from management agreements would not have occurred in the past and will not occur in the future if the Commission treats management agreements as attributable interests for purposes of applying

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[11] *See, e.g.*, 47 C.F.R. §§ 90.633(c), (d); 90.631(a), (c).

[12] *See* Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 312, 389 (to be codified at 47 U.S.C. §§ 309(j)(4)(A), 309(j)(4)(D)); *see also Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 2348, 2388-93 (1994) (Second Report and Order); *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, FCC 94-178, ¶¶ 93-201 (July 15, 1994) (Fifth Report and Order).

spectrum caps. Applying prophylactic action in the manner currently proposed will reduce the availability of these arrangements to designated entities and other inexperienced licensees that are most likely to benefit from them.

Fifth, in discouraging the use of management agreements for the reasons stated in the *Second Further Notice*,[13] the Commission has failed to take into account the business experience and talent of licensees. Licensees make business decisions that they view as in their best interests. The variety of these decisions and their underlying strategies is one of the primary reasons that the telecommunications industry is so dynamic and innovative. Accordingly, Motorola recommends that the Commission not restrain unnecessarily licensees' ability to contract freely within the parameters of established Commission precedent.

Finally, the Commission's analysis overlooks the role that competitive bidding is likely to play in diminishing the potential for licensees to over-delegate to managers. A well-recognized benefit of competitive bidding is that it will ensure that only entities with a genuine interest in becoming communications providers will secure a license. Given the prices likely to be paid for licenses in the auction process, it is extremely unlikely that licensees will be so cavalier about their investment as to hire a manager who will be prone to abuse his access to information, or so uninvolved in the operations of their investment that the manager's performance will go unmonitored.

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[13] *See Second Further Notice* ¶ 6.

B. Resale Agreements

Although the Commission also seeks comment as to whether resale agreements should be attributed to resellers in applying the PCS spectrum aggregation limit, the PCS-cellular cross-ownership rules, or a general CMRS spectrum cap, it tentatively concludes that the attribution of spectrum to resellers is unnecessary in light of the fact that, generally, resellers are unable to exercise effective control over the spectrum on which they provide service.[14] In addition, the Commission notes in this regard that, as a general matter, resellers lack the ability to reduce the amount of service provided over spectrum used for resale because other resellers are free to enter into similar arrangements.[15]

Motorola agrees with the Commission's tentative conclusion that the attribution of resale agreements for the purpose of applying spectrum caps is unnecessary and unwarranted because resale activities do not raise anticompetitive concerns. In addition, the Commission has explicitly found that resale activities promote the public interest by extending the availability of communications services, promoting the efficient use of spectrum, and enhancing the level of competition.[16] As such, by

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14 *Second Further Notice* ¶¶ 12-13.

15 *Id.* ¶ 13.

16 *See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 F.C.C. 2d 167, 172 (1980) (Report and Order) (discussing the benefits of resale of common carriers' domestic public switched network services); *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 F.C.C. 2d 469, 511 (1981) (Report and Order) (extending resale policies to cellular),

(continued...)

discouraging participation in resale activities, the inclusion of resale agreements as attributable interests in connection with the imposition of spectrum aggregation limits would be contrary to the best interest of the public.

C. Joint Marketing Agreements

Lastly, although the Commission recognized in the *Second Further Notice* that joint marketing agreements are beneficial to licensees and consumers because they result in savings through the pooling of resources for advertising and sales, it also voiced concern that these arrangements may permit competitors to have access to sensitive business information or have other anticompetitive effects.[17] Consequently, the Commission tentatively proposes that, when a licensee enters into a joint marketing venture with one or more licensees whose geographic market areas have an overlap of 10 percent of the population, the interest of the other joint venture licensees should be attributable for purposes of applying the various spectrum aggregation limits applicable to mobile service providers.[18]

Motorola opposes treating joint marketing agreements as attributable for purposes of imposing any type of spectrum aggregation cap. Joint marketing mechanisms allow small, independent operators to function cooperatively, thereby

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[16](...continued)
modified on recon., 89 F.C.C. 2d 58 (1982) (Memorandum Opinion and Order), *further modified*, 90 F.C.C. 2d 571 (1982) (Memorandum Opinion and Order on Further Reconsideration).

[17] *Second Further Notice* ¶ 14.

[18] *Id.* ¶ 16.

permitting them to obtain efficiencies otherwise reserved to larger competitors. In this manner, the use of joint marketing arrangements serves the public interest by enhancing the competitive viability of small service providers, and by reducing the operating expenses of participating licensees. The adoption of rules treating these types of arrangements as attributable interests would discourage their use and would deprive consumers and licensees of the benefits of joint marketing agreements without serving any demonstrable purpose. Furthermore, because licensees that participate in cooperative ventures are required to retain control of their stations and to comply with the Communications Act, the Commission's rules and policies, and antitrust laws,[19] these types of arrangements do not pose a risk of anticompetitive conduct.

Moreover, because joint marketing agreements, like management agreements, come in an infinite variety of permutations, the Commission's proposal to treat joint marketing arrangements as attributable interests simply because one or more member licensees may share a geographic overlap in their market areas is unnecessarily overbroad and is likely to encompass arrangements that do not pose a threat to competition. Such a broad rule requiring these arrangements to be attributable will therefore unnecessarily discourage the use of these beneficial instruments, and should be avoided.

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[19] *See Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2787 (1992) (Report and Order) (discussing joint marketing ventures in the broadcast context).

VI. CONCLUSION

In summary, Motorola strongly supports regulatory action designed to foster the development of competition and diversity in the mobile services marketplace. Motorola does not believe, however, that imposition of a general cap on the amount of CMRS spectrum that licensees may aggregate or the treatment of management agreements, resale agreements, or joint marketing as attributable interests for the purpose of applying spectrum aggregation limits will serve this goal. Accordingly, Motorola urges the Commission not to proceed with its proposals in either of these respects.

Respectfully submitted,

Motorola Inc.

CERTIFICATE OF SERVICE

I, Carol J. Scanlan, hereby certify that courtesy copies of the attached "Comments of Motorola Inc." have been served via hand delivery on the following persons on this 9th day of August, 1994:

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